

In the United States District Court
FOR THE DISTRICT OF COLUMBIA

CENTER FOR FOOD SAFETY,)
660 Pennsylvania Ave SE #402)
Washington, DC 20003)

Plaintiff,)

vs.)

UNITED STATES ARMY CORPS OF)
ENGINEERS,)
441 G Street N.W.)
Washington, DC 20314-1000)

Defendant.)
_____)

Case No. 1:22-cv-2183

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. NATURE OF ACTION

1. The Center for Food Safety (CFS)—a nonprofit public interest and environmental advocacy organization working to protect public health and the environment—brings this civil action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, challenging the United States Army Corps of Engineers' (USACE) unlawful withholding of records that pertain to USACE's approval of nationwide permit (NWP) 56.

2. CFS filed a FOIA request with USACE to gain a better understanding of USACE's decision to approve NWP 56, which allows structures in marine and estuarine waters for finfish aquaculture. The goal of the request was to open the operations and activities of government to public scrutiny and contribute significantly to the public's understanding of the agency's action. CFS also requested a fee waiver in accordance with 5 U.S.C. § 552(a)(4)(A)(iii).

3. USACE is violating FOIA by failing to produce records in response to CFS's FOIA request, failing to conduct an adequate search for responsive records, and by failing to provide an initial determination as to the scope of the records to be produced or withheld, an estimated date by which the agency's search will be complete, and a determination on CFS's fee waiver request.

4. USACE's unlawful withholding of public records undermines FOIA's basic purpose of government transparency. Because prompt access to these records is necessary to effectuate FOIA's purpose, CFS seeks declaratory relief establishing that USACE is in violation of FOIA, and injunctive relief directing USACE to provide responsive records without any further delay.

II. JURISDICTION AND VENUE

5. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

6. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which expressly provides a venue for FOIA cases in the District Court of the District of Columbia.

7. Declaratory relief is appropriate under 28 U.S.C. § 2201.

8. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

III. PARTIES

9. Plaintiff CFS is a national 501(c)(3) nonprofit public interest and environmental advocacy organization with a mission to protect public health and the environment by curbing the proliferation of harmful food production technologies, such as industrial aquaculture practices, and by promoting sustainable forms of food production. CFS represents over one million members who reside in every state across the country, who support safe, sustainable food production. CFS has long had a specific aquaculture program, dedicated to addressing the adverse environmental and public health impacts of industrial aquaculture, including numerous policy, scientific, and legal staff. In its program, CFS strives to ensure and improve aquaculture oversight, furthering policy and cultural dialogue with regulatory agencies, consumers, chefs, landowners, and legislators on the critical need to protect public health and the environment from industrial aquaculture and to promote and protect more sustainable alternatives. CFS and its members are harmed by USACE's violations of FOIA, as such violations preclude CFS from gaining a full

understanding of the decision-making process regarding the approval of NWP 56 and prevent CFS from disseminating information to the public concerning USACE's oversight of this novel industry.

10. Defendant USACE is an agency within the United States Government. USACE is in possession and control of the records that CFS seeks and is an agency within the meaning of 5 U.S.C. § 552(f)(1). USACE is therefore subject to FOIA.

IV. LEGAL BACKGROUND

11. The basic purpose of FOIA is to promote government transparency and public oversight of agency action. The statute effectuates this objective by establishing the public's right to access all federal agency records unless such records may be withheld pursuant to one of nine, narrowly construed exemptions. 5 U.S.C. § 552(b)(1)-(9).

12. FOIA imposes stringent deadlines on federal agencies with regard to making initial determinations in response to FOIA requests. Within twenty working days of receiving a FOIA request, an agency must determine whether it will release the requested records, and must notify the requester of its determination, the reasons for its decision, and the requester's right to appeal an adverse decision to the head of the agency. *Id.* § 552(a)(6)(A). An agency must also make a determination as to a fee waiver request within the twenty-day time period. *Bensman v. Nat'l Park Serv.*, 806 F. Supp. 2d 31, 39 (D.D.C. 2011).

13. Congress has specified certain limited instances in which federal agencies may extend this twenty-working-day deadline. First, an agency may toll the deadline to seek additional information or clarification from a requester, but that tolling period ends when the agency receives such information or clarification. *Id.* § 552(a)(6)(A)(ii). Second, in "unusual circumstances" an

agency may extend the deadline no more than ten additional working days by providing written notice to the requester that sets forth the circumstances justifying the extension. *Id.* § 552(a)(6)(B)(i).

14. FOIA requires that a determination under 5 U.S.C. § 552(a)(6)(A) “must be more than just an initial statement that the agency will generally comply with a FOIA request and will produce non-exempt documents and claim exemptions in the future.” *Citizens for Responsibility and Ethics in Wash. v. Fed. Election Comm’n*, 711 F.3d 180, 188 (D.C. Cir. 2013).

15. For a determination to trigger the administrative exhaustion requirement, the agency must at least “(i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the ‘determination’ is adverse.” *Id.* at 188.

16. If the agency fails to respond within the applicable time limit, the requester “shall be deemed to have exhausted his administrative remedies.” 5 U.S.C. § 552(a)(6)(C)(i).

17. Such constructive exhaustion¹ “allows immediate recourse to the courts to compel the agency’s response to a FOIA request.” *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 62, 64 (D.C. Cir. 1990).

18. The court “then has the authority to oversee and supervise the agency’s progress in responding to the request.” *Seavey v. DOJ*, Case No. 15-1303, 2017 WL 3112816, at *2 (D.D.C. July 20, 2017) (citing *Citizens for Responsibility and Ethics in Wash.*, 711 F.3d at 189); *see also Clemente*

¹ “Constructive exhaustion is determined by the actions (or lack thereof) an agency has taken by the time a suit is filed in the district court.” *Wisdom v. U.S. Tr. Program*, 232 F. Supp. 3d 97, 113 (D.D.C. 2017) (citing *Oglesby*, 920 F.2d at 64).

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